(1) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JOHN W. RAGSDALE, JR. AS TRUSTEE OF THE ESTATE OF NED MILLER,

Petitioner,

v.

RUBBERMAID, INC. AND RUBBERMAID COMMERCIAL PRODUCTS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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3 App

QUESTION PRESENTED

Is the false claim action under 31 U.S.C. § 3730(b), and the action for retaliation under 31 U.S.C. § 3730(h) the same cause of action for purposes of res judicata?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, John W. Ragsdale, Jr., as bankruptcy trustee for the estate of Ned Miller, who will be referred to in this petition as Miller for purposes of clarity, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *John W. Ragsdale, Jr., as Bankruptcy Trustee for the Estate of Ned Miller v. Rubbermaid, Inc. and Rubbermaid Commercial Products, Inc.*, 193 F.3d 1235 (11th Cir. 1999) (App. A). The opinion of the district court in the same caption, Dist. Ct. No. 1:96-CV-487-MAS, is not published. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on October 27, 1999. The Court of Appeals denied a timely petition for rehearing and for rehearing en banc on January 5, 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

31 U.S.C. § 3730(b)(1) provides:

> Actions by Private Persons. – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

31 U.S.C. § 3730(h) provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

STATEMENT OF THE CASE

The core facts should not be in material dispute for purposes of this petition. Miller was employed by Rubbermaid as its National Accounts Manager. It developed that sales to the federal government fell within Miller's responsibilities.

Miller became concerned that the price of goods sold to the government did not comply with federal regulations. He reported his concerns to Rubbermaid management.

Because of his concerns, Miller attended a seminar on government contracting in early March, 1992. After attending the seminar, Miller became more concerned about Rubbermaid's pricing practices. Miller contacted a lawyer on March 19, 1992. He was fired by Rubbermaid on March 20, 1992.

Miller contends he was fired because Rubbermaid believed he was looking into bringing a *qui tam* action against it. Whether or not that is true is not in issue for purposes of this petition.

Through other counsel, on January 5, 1993, Miller filed a *qui tam* action against Rubbermaid in the United States District Court for the Northern District of Georgia. Miller's *qui tam* action was taken over by the Department of Justice, and subsequently transferred to the Western District of Virginia. The case was later settled, and Miller received a bounty of $185,000.00.

Miller then brought this action for retaliation on February 27, 1996. On July 29, 1998, the district court granted summary judgment to Rubbermaid on the basis of res

judicata. The Eleventh Circuit affirmed on the basis that the *qui tam* action brought by Miller on January 5, 1993, and the retaliation action brought on February 27, 1996 were the same cause of action. That is the issue raised in this petition.

The basis of the district court's jurisdiction was under 28 U.S.C. § 1331 as the case was brought under a federal statute.

REASONS FOR GRANTING THE WRIT

Miller respectfully submits that the writ of certiorari should be granted to uniformly decide the application of the doctrine of res judicata to a unique combination of statutory remedies. Miller submits that it is both impractical, and inconsistent with the plain language of the False Claims Act to hold that the *qui tam* action under 31 U.S.C. § 3730(b)(1), and the retaliation action under 31 U.S.C. § 3730(h) are, for purposes of res judicata, the same cause of action. Miller requests that the writ of certiorari be granted so that this important issue in the judicial administration of the False Claims Act can be decided.

The Court of Appeals began its analysis by pointing out that the principal test for deciding whether causes of action are the same is whether the primary right and duty are the same in each case. The substance of the two actions, not their form, is the critical inquiry. But the Court of Appeals then reverted to form in stating the issue upon which its decision was based: Do the two

claims arise out of the same transaction or series of transactions?

It is obvious that if a relator gets fired for having engaged in protected activity under the False Claims Act, the alleged retaliation is going to arise out of the same series of transactions as does the protected activity. But that transactional type of analysis hardly answers the question of whether the two separate acts of wrongdoing amount to the same cause of action. They are related in time because one is going to follow the other by definition. The claims are also related in sequence in where they are found in the United States Code. But those relations are form. As Petitioner attempted to point out in the Court of Appeals, the substance of the two claims is entirely separate.

The right of action for retaliation found in 31 U.S.C. § 3730(h) belongs to the offended employee. The issue is personal to the offended employee. Although the employee/relator can participate in the *qui tam* action after government intervention, it can hardly be said that when the government intervenes, as it did in the case brought by Miller, that the parties, or their interests, are identical. In point of fact, the government may quite understandably argue that the retaliation claim amounts to an undue burden on, or interference with the False Claims Act litigation. 31 U.S.C. § 3730(c)(2)(C)(iv) and (c)(2)(D). The government cannot assure that Miller's rights against retaliation will be protected. *Southwest Airlines Co. v. Texas International Airlines*, 546 F.2d 84 (5th Cir. 1977). As a practical matter, it is not even interested.

Without overarguing the issue at this stage, it would seem quite elementary that the primary rights held in the two claims are quite distinct. Of more practical importance is the question of how a retaliation claim is going to be allowed to tag along with a *qui tam* claim which has been assumed by the government. In this case, for example, the *qui tam* claim was transferred to another venue after government intervention, but venue over Miller's retaliation claim, had it been brought at the same time, would have presumably remained in Georgia. Even if it could be said that because of the unique combination of remedies provided by the False Claims Act, the individual's right to choose his forum could be lawfully compromised, that does not solve the practical difficulties that will arise in discovery, pretrial procedure, and trial on account of the competing interests between the governmental and the individual litigant. The truth is that a determination of the false claims issue does not require, or even desire an adjudication of the retaliation issue. The conflicts in discovery, pretrial procedure, and trial are so obvious as to require no enumeration.

CONCLUSION

Miller respectfully urges that the Court of Appeals did not actually consider the substance of the two claims when it found that they amount to the same cause of action, nor the practical difficulties that arise if they were

litigated as one case. We respectfully urge that this petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-9299

D. C. Docket No. 1:96-cv-487-MHS

JOHN W. RAGSDALE, JR., Trustee, for the bankruptcy estate of Ned W. Miller,

Plaintiff-Appellant,

versus

RUBBERMAID, INC., RUBBERMAID COMMERCIAL PRODUCTS, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(October 27, 1999)

Before CARNES, Circuit Judge, HILL, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

HILL, Senior Circuit Judge:

This case presents a single question of law issue on appeal: after a terminated whistleblowing employee files

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* Honorable William M. Hoeveler, Senior U. S. District Judge for the Southern District of Florida, sitting by designation.

a complaint on behalf of the United States Government against his former employer pursuant to the *qui tam* provisions of the False Claims Act[1] (FCA or the Act), 31 U.S.C. § 3729, *et seq.*, does the doctrine of res judicata bar his FCA § 3730(h) claim for retaliation, filed after the *qui tam* action settles? The district court answered in the affirmative, granting summary judgment for the defendants. Under a *de novo* review, we affirm.

I.

Ned Miller[2] was employed as a salesman by Rubbermaid Commercial Products, Inc., a subsidiary of Rubbermaid, Inc. (collectively Rubbermaid), from 1988 until he was fired in March 1992. Ten months later, in January 1993, he filed a whistleblower action (Rubbermaid I) on behalf of the government against Rubbermaid alleging fraudulent billing practices under the *qui tam* provisions

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[1] The Act was first passed in 1863 by Congress at the request of President Lincoln to combat profiteering by Union Army suppliers during the Civil War. *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-98 (11th Cir. 1991) (for an historical discussion of the FCA). The purpose of the Act, then and now, is to encourage private individuals who are aware of fraud being perpetrated against the government to bring such information forward. *Id.* at 1497 (citations omitted). The shorthand *qui tam* is derived from the Latin phrase "*qui tam* pro domingo rege quam pro se imposo sequitur" meaning "who brings the action as well for the king as for himself." *United States ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 746 n. 3 (9th Cir. 1993), *cert. denied*, 510 U.S. 1140, 114 S.Ct. 1125 (1994).

[2] Although Miller was the original plaintiff in this case, his trustee in bankruptcy was substituted as plaintiff by district court order dated November 17, 1997.

of the FCA.[3] At that time, for whatever reason, he did not state an FCA claim for retaliatory discharge in this complaint. After the government intervened in the lawsuit, Miller remained as a relator. When Rubbermaid I settled, Miller consented to the settlement agreement and received $185,000, his bounty for reporting the fraudulent activity. 31 U.S.C. § 3730(c)(1). Subsequent to the settlement, in February 1996, he then filed a retaliation action (Rubbermaid II) against his former employer under Act § 3730(h), a provision that prohibits employers from retaliating against employees who file or assist in *qui tam* actions against their employer.[4]

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[3] One month before he was terminated, Miller had informed Rubbermaid of his concerns about their pricing practices.

[4] The provision reads:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the

Using the transactional approach to claim preclusion, the district court found that Miller's Act § 3730(h) claim in Rubbermaid II and his *qui tam* claim in Rubbermaid I arose out of the same nucleus of operative fact. *See Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1503 (11th Cir. 1990). It therefore held that the second claim was barred by the doctrine of res judicata and granted Rubbermaid's motion for summary judgment. Miller appeals.

II.

Although the two claims arise under the same chapter of the United States Code, Miller contends that those involved in Rubbermaid I and Rubbermaid II involve distinct rights and duties and different causes of action. He argues that the issue here in Rubbermaid II is not whether the government was overcharged by Rubbermaid but whether he was fired by Rubbermaid for questioning its pricing practices. In short, Miller claims, the government has no interest in the relief he now seeks.

Miller concedes that the facts in Rubbermaid I and II are related in time, and debatably, would have formed a convenient trial unit. He suggests that, as the first case did not require a determination of the reason for his termination, his retaliation claim in Rubbermaid II therefore did not arise out of the same operative nucleus of fact as did the *qui tam* claim in Rubbermaid I. *Id.*

United States for the relief provided in this subsection.

31 U.S.C. § 3730(h).

Rubbermaid, on the other hand, contends that Rubbermaid I and II are based upon the same factual predicate and contain the same cause of action for res judicata purposes. It argues that both claims rest upon statutory provisions of the FCA; both claims relate to Miller's former employment with Rubbermaid; both claims involve the same parties and witnesses; and both claims would have made a convenient trial unit.

Similarly, Rubbermaid contends that in order to avoid piecemeal litigation, Miller could have *and should have* raised his Rubbermaid II claim as part of his Rubbermaid I claim. Then all claims arising out of the same facts and involving the same parties would have been litigated in one forum.[5]

Rubbermaid also strongly emphasizes the point that Miller's cause of action in Rubbermaid II accrued at the time his employment was terminated, some ten months *before* he filed Rubbermaid I. This is not a case, they argue, where an employee files a FCA claim, blowing the whistle on his or her employer; pricing violations are

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[5] Rubbermaid relies heavily upon a Southern District of Texas case. *United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F.Supp. 370 (S.D.Tex.1994), *aff'd without opinion*, 53 F.3d 1282 (5th Cir. 1995). In Paul, the plaintiff first brought a wrongful termination claim for his unwillingness to violate the FCA in state court. After that case was adjudicated, he then filed suit against his former employer in federal court alleging pricing violations under the FCA. The district court dismissed his FCA claims on the basis of res judicata. It found that, although Paul's second complaint asserted a new theory and a new measure of recovery, it arose from the same operative facts that gave rise to his prior lawsuit. *Id.* at 374-75.

litigated; and *then* the employee is fired. Res judicata is applicable, Rubbermaid contends, because both of Miller's claims had accrued as of the date he filed his first complaint.

III.

Barring a claim on the basis of res judicata is a determination of law. *Israel Discount Bank Ltd. v. Entin*, 951 F.2d 311, 314 (11th Cir. 1992). Our standard of review therefore is *de novo. Id.*, citing *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1548 n. 1 (11th Cir.), *cert. denied*, 111 S.Ct. 387 (1990).

IV.

The purpose behind the doctrine of res judicata is that the "full and fair opportunity to litigate protects [a party's] adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 99 S.Ct. 970 (1979). Res judicata bars the filing of claims which were raised or could have been raised in an earlier proceeding. *Citibank*, 904 F.2d at 1501 (citing *I.A. Durbin, Inc. v. Jefferson Nat. Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986)).

Under Eleventh Circuit precedent, a claim will be barred by prior litigation if all four of the following elements are present: (1) there is a final judgment on the merits; (2) the decision was rendered by a court of competent jurisdiction; (3) the parties, or those in privity with

them, are identical in both suits; and (4) the same cause of action is involved in both cases.[6] *Id.* From the record it is clear that the first three requirements are met. First, there was a final judgment on the merits in Rubbermaid I. The parties reached a settlement agreement and executed a stipulation of dismissal, barring a later suit on the same cause of action. *Id.* at 1501-1502. Second, the Rubbermaid I court had proper jurisdiction. *Id.* Third, the parties are identical.[7] *Id.* Only the fourth element of claim preclusion, identity of the cause(s) of action, remains. Do Miller's FCA retaliatory discharge claim against Rubbermaid and his *qui tam* claim under the FCA against Rubbermaid epitomize the same cause of action?

In the Eleventh Circuit, "[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." *Citibank*, 904 F.2d at 1503 (citations omitted). "It is now said, in general, that if a case arises out of the same nucleus of operative fact, or is based upon the

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[6] Rubbermaid argues that Miller confuses res judicata with the doctrine of collateral estoppel on appeal. Rubbermaid claims that this case does not involve collateral estoppel as neither it nor the district court analyzed this case under that theory.

[7] Miller contends that after the government intervened in Rubbermaid I and assumed primary control, he was merely a relator, not a true party. The Act makes clear, however, that with certain exceptions not relevant here, relators have unrestricted participation in the litigation. 31 U.S.C. §§ 3730(c)(1), 3730(c)(2)(C)(iv), 3730(c)(2)(D).

same factual predicate, as a former action, that the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Id.*

We "must [therefore] look to the factual issues to be resolved [in Rubbermaid II], and compare them with the issues explored in" Rubbermaid I. *Id.* Did they arise out of the same transaction or series of transactions?[8] Could

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[8] The Restatement (Second) of Judgments describes the rationale of a transactional approach to claim preclusion. *See* Restatement (Second) of Judgments § 24(2) (1980). Just what factual grouping constitutes a "transaction" or what factual groupings constitute a "series," are "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.*

As the commentary to § 24(2) illustrates, one must apply a pragmatic standard:

> The expression "transaction, or series of connected transactions," is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. And underlying the standard is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim.
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> * * *
>
> In general, the expression connotes a natural grouping or common nucleus of operative facts. Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken

Miller have brought his retaliation claim when he brought his *qui tam* claim? Should he have brought it earlier?

Interestingly enough, both parties rely on *Pleming v. Universal-Rundle Corp.*, 142 F.3d 1354 (11th Cir. 1998) (Pleming II) to support their different positions. The plaintiff did not receive a job for which she applied. In 1993, she filed an employment discrimination action against her employer under Title VII, 42 U.S.C. § 2000e, *et seq.*, and 42 U.S.C. § 1981 for race and sex discrimination. *See Pleming v. Universal-Rundle Corp.*, No. 1:94-cv-2004-RLV, slip op. (N.D.Ga. Nov. 22, 1995), *aff'd without opinion*, 100 F.3d 971 (11th Cir. 1996) (Pleming I). During the course of litigation, in 1994, two additional positions became available. Pleming did not apply for either of these positions. The employer filled them with other applicants.

Although Pleming did not amend her Pleming I complaint to include additional allegations of discrimination arising out of the 1994 incidents, she described them in

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> together, they form a convenient unit for trial purposes. Though no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first. If there is a substantial overlap, the second action should ordinarily be held precluded. But the opposite does not hold true; even when there is not a substantial overlap, the second action may be precluded if it stems from the same transaction or series.

Restatement (Second) of Judgments § 24(2) cmt. b (1980).

her briefs. The magistrate judge referred to them in his report and recommendation. Nevertheless, the district court granted summary judgment for the employer, finding that Pleming had failed to prove that the company's non-discriminatory explanation was pretextual. *Id.*

Pleming filed suit again. *See Pleming*, 142 F.3d at 1354. In Pleming II she based her 42 U.S.C. § 1981 action on the 1994 job openings. On the basis of res judicata, the district court dismissed her second complaint. A panel of this circuit reversed the dismissal. It found that the summary judgment in Pleming I did not have a res judicata effect so as to bar her Pleming II claim based upon the 1994 hiring decisions, which had not occurred when the Pleming I complaint was filed. "We explained that the parties frame the scope of litigation at the time the complaint is filed and that a judgment is only conclusive regarding the matters that the parties might have litigated at that time but not regarding 'new rights acquired, pending the action which might have been, but which were not required to be litigated.' " *Id.* at 1357 (citing *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992)).

The Pleming II panel, quoting *Manning*, stated:

> [W]e do not believe that the res judicata preclusion of claims that "could have been brought" in the earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead, we believe that, for res judicata purposes, claims that "could have been brought" are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action.

Id.

The real issue in Pleming II was whether the plaintiff had actually asserted her second claim in the course of briefing her first action. Miller cites Pleming II, however, for the proposition that, although his retaliation claim existed at the time he filed his *qui tam* action, the two claims are distinct. Comparing the substance of the actions, not their form, *Citibank*, 904 F.2d at 1503, his reading of the case is inapposite. Here it is undisputed that Miller's termination from Rubbermaid, the event giving rise to his retaliatory discharge claim in Rubbermaid II, *occurred more than ten months before* Miller filed his complaint in Rubbermaid I.[9] For res judicata purposes, it was in existence at the time the original complaint was filed. Pleming, 142 F.3d at 1360.

Indeed, then, both claims grew out of a common nucleus of operative fact: Rubbermaid engaged in illegal conduct and Miller's discovery of that conduct led to his discharge, a series of transactions closely related in time, space, and origin. *Citibank*, 904 F.2d at 1503; Restatement (Second) of Judgments § 24(2) (1980). In terms of trial convenience, there is substantial overlap as both claims involve the FCA, Miller's employment with Rubbermaid, and the same parties and witnesses. *Id.*

In addition, Miller received a bounty of $185,000 in Rubbermaid I. As the district court observed, to allow him to proceed with Rubbermaid II would permit future *qui tam* plaintiffs strategically to sever their claims in the

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[9] As Rubbermaid suggests, a reasonable reading of Pleming II would be that had the plaintiff's second claim accrued prior to the filing of the first lawsuit, as is the case here, her second action would then have been barred by res judicata.

hope of obtaining a second bite at the apple, should their first action prove unsuccessful. This is textbook res judicata.

V.

Finding that both Miller's claim for retaliatory discharge under the FCA and his FCA *qui tam* claim arose from the same nucleus of operative fact, we conclude that the cause of action in Rubbermaid I and the cause of action in Rubbermaid II are the same for purposes of res judicata. As all four elements of res judicata are satisfied, we affirm the district court's order granting Rubbermaid's motion for summary judgment.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN W. RAGSDALE, Plaintiff,	:	CIVIL ACTION
v.	:	1:96-cv-487-MHS
RUBBERMAID, INC., et al.,	:	
Defendants.	:	

ORDER

(Filed Jul. 29, 1998)

This action is before the Court on defendants' motion for summary judgment.[1] For the reasons stated below, the Court concludes that plaintiff's claims are barred by the doctrine of res judicata and accordingly grants defendants' motion.

Background

Ned Miller[2] was an employee of defendant Rubbermaid Commercial Products, Inc., when he came to the

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[1] Plaintiff has also requested a hearing on the summary judgment motion. After reviewing the record, the Court finds that oral argument is not necessary and accordingly denies the request.

[2] After commencing this action, Miller filed for bankruptcy, and this claim became a part of the bankruptcy estate. John Ragsdale is bankruptcy trustee for the estate. Although the estate is technically the plaintiff in this action, the Court will refer to Miller as "plaintiff".

conclusion that the billing practices of Rubbermaid, Inc., and Rubbermaid Commercial Products, Inc. (collectively "Rubbermaid") violated the False Claims Act, 31 U.S.C. § 3730 (FCA). According to plaintiff, he informed his superiors of his concerns, causing Rubbermaid to fear that plaintiff planned to pursue a qui tam action against it. Thereafter, Rubbermaid terminated plaintiff's employment, after which plaintiff did file a qui tam action. In that action, plaintiff did not state a claim for retaliation pursuant to 31 U.S.C. § 3730(h), which protects employees attempting to enforce the FCA from retaliation by their employers.

The United States intervened in that action, and ultimately settled with Rubbermaid. Plaintiff consented to the settlement and received a portion of the proceeds.

Now plaintiff has filed a separate lawsuit for retaliation based upon the termination that occurred prior to the filing of his qui tam action. Rubbermaid moves for summary judgment on, inter alia, res judicata grounds.

Discussion

"A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). The principle promotes efficiency in the resolution of legal disputes and protects defendants from piecemeal litigation by forcing plaintiffs to assert in a single action all possible claims arising from a particular set of facts.

Res judicata bars claims when the following four elements are present: 1) there is a final judgment on the merits; 2) the decision was rendered by a court of competent jurisdiction; 3) the parties, or their privies, are identical in both lawsuits; and 4) the same cause of action is involved in both lawsuits. *Citibank v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). In this action, Rubbermaid has demonstrated the existence of each of these factors. Accordingly, plaintiff's retaliation claim is barred.

First, there exists a prior final judgment on the merits by a court of competent jurisdiction, thus satisfying the first two res judicata requirements. The qui tam action was concluded when the parties reached a settlement agreement and executed a stipulation of dismissal with prejudice, which constitutes a final judgment on the merits for purposes of claim preclusion. *Id.*

Second, this case involves the same "cause of action" as the prior qui tam lawsuit. In determining whether two claims are part of a single cause of action, the inquiry is not whether the two claims apply the same legal theory or analysis, but whether the cases "arise[] out of the same nucleus of operative fact, or [are] based on the same factual predicate. . . . " *Id.* at 1503; *see also, Olmstead v. Amoco Oil Co.*, 725 F.2d 627 (11th Cir. 1984). This "transactional approach" to claim preclusion requires the Court to consider the following factors: whether 1) the facts are related in time, space, origin, or motivation; 2) whether the facts from a convenient trial unit; and 3) whether the facts' treatment as a trial unit would conform to the parties' expectations. Restatement of Judgments § 24(2).

The Court concludes that plaintiff's retaliation claim and his previous qui tam claim grew out of a common nucleus of operative fact. *See United States ex rel. Dilip Kumar Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 374 (S.D. Tex. 1994);[3] *see also, Bailey v. USX Corporation*, 658 F. Supp. 279 (N.D. Ala. 1987) (holding that facts giving rise to a retaliation claim in Title VII action were part of the same nucleus of operative fact as facts making out plaintiff's underlying discrimination claim). Plaintiff alleges that Rubbermaid engaged in illegal conduct and that plaintiff's discovery of that conduct led to his discharge – a series of transactions closely related in time, space, and origin. Moreover, plaintiff's retaliation claim could have been adjudicated in the prior lawsuit, and the two claims together would have made a convenient trial unit. Finally, because the claims arise under the same statute and are so closely related factually, the parties would have expected them to be litigated simultaneously. For all of these reasons, the two cases comprise the same cause of action.

Third, the parties in the two lawsuits are identical. Plaintiff contends that once the United States intervened, he was no longer a party to the qui tam action but was merely a "relator." Thus, he contends, the settlement between the United States and Rubbermaid does not

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[3] In *Paul*, the court held that plaintiff's qui tam claim was barred by res judicata because plaintiff had already litigated a claim for retaliation based on his termination for having opposed defendants' FCA-violative practices. The court found that the retaliation claim and underlying qui tam claim grew out of a common nucleus of operative fact.

preclude his current lawsuit. However, the 1986 amendments to the FCA explicitly state that qui tam plaintiffs remain "parties" throughout FCA litigation, even when the government intervenes and assumes primary control over the case. 31 U.S.C. § 3730(c) (1). The statute affords relators "unrestricted participation" in the litigation, subject to requests for limitation by the Government for the defendant on a showing of delay, interference, harassment, or undue burden. 31 U.S.C. §§ 3730(c) (2) (C) (iv), 3730(c) (2) (D); *see also, United States of America ex rel. Brett Roby v. The Boeing Company*, 995 F. Supp. 790 (S.D. Ohio 1998); *United States of America ex rel. Robert Stillwell v. Hughs Helicopters, Inc.*, 714 F. Supp. 1084, 1091 (C.D. Cal. 1989) (both emphasizing that a qui tam plaintiff remains a "party" even after the government intervenes in a qui tam action).

Finally, allowing plaintiff to proceed with this lawsuit would permit future qui tam plaintiffs strategically to withhold claims in the hopes of obtaining a second bite at the apple if their initial actions prove unsuccessful. Such behavior is precisely what the doctrine of res judicata was designed to prevent.

Summary

The Court DENIES plaintiff's motion for oral argument [#58-1], GRANTS defendants' motion for summary judgment [#51-1], and DISMISSES this action.

IT IS SO ORDERED, this 28th day of July, 1998.

/s/ Marvin H. Shoob
Marvin H. Shoob, Senior
Judge
United States District Court
Northern District of Georgia

ENTERED ON DOCKET
JUL 29 1998
L.D.T., CLERK
BY DEPUTY CLERK

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-9299-JJ

JOHN W. RAGSDALE, JR., Trustee for the bankruptcy estate of Ned W. Miller,

Plaintiff-Appellant,

versus

RUBBERMAID, INC., RUBBERMAID COMMERCIAL INC.,

Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Jan. 08, 2000)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion ___, 11th Cir., 19___, ___ F.2d ___).

Before: CARNES, Circuit Judge, HILL, Senior Circuit Judge, and HOEVELER*, Senior District Judge.

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*Honorable William M. Hoeveler, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
SENIOR UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

Supreme Court, U.S.
FILED
MAY 4 2000
CLERK

(2)

No. 99-1612

IN THE

Supreme Court of the United States

JOHN W. RAGSDALE, JR., as trustee of the bankruptcy estate of NED MILLER,

Petitioner,

v.

RUBBERMAID, INC., AND RUBBERMAID COMMERCIAL PRODUCTS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the doctrine of claim preclusion bar a retaliation action under 31 U.S.C. § 3730(h) which could have been, but was not, brought at the same time as a false claim action under 31 U.S.C. § 3730(b)?

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STATEMENT OF THE CASE

Ned Miller (hereinafter "Miller")[1] began working for Respondent Rubbermaid Commercial Products, Inc. (for clarity, Respondents are referred to hereinafter collectively as "Rubbermaid"), in May 1998 as a National Accounts Manager, selling Rubbermaid products to supermarket chains, convenience store chains, health care chains, gas stations and other national users. Miller later became more involved with sales of Rubbermaid products to the government and less involved with national accounts. In early 1990, during the course of performing his duties in government sales, Miller became concerned about Rubbermaid's pricing practices and relayed those concerns to Rubbermaid's Vice President of Sales. Miller also sent a memorandum to his supervisor stating that certain pricing practices were in violation of Rubbermaid's agreements with the federal government.

In June 1991, Miller began reporting to a new supervisor, and in late February 1992, Miller reported his concerns about Rubbermaid's pricing practices to his new supervisor. As a result of this conversation, Miller's supervisor allowed him to attend a seminar entitled "Key Issues in Government Procurement" in Washington, D.C.

This seminar apparently sparked some further concern in Miller about Rubbermaid's pricing practices. Miller testified during his deposition that between March 6, 1992, and March 19, 1992, he worried about his

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[1]Although John W. Ragsdale, Jr., as trustee for Ned Miller's bankruptcy estate, took over Miller's case against Defendants and is the petitioner in this case, this brief refers to Miller as the petitioner.

criminal and civil liability for Rubbermaid's alleged unlawful pricing practices, as well as the potential criminal and civil liability of Rubbermaid. Because of those concerns, Miller contacted two attorneys between March 6 and March 19, 1992. Significantly, Miller told no one at Rubbermaid that he was going to, or did in fact, contact these attorneys.

Miller's termination occurred as a result of a corporate restructuring of certain Rubbermaid business units in an effort to improve Rubbermaid's reduced earnings and flat and/or reduced top line growth. Rubbermaid eliminated Miller's position to reduce the costs and expenses associated with positions that involved duties duplicated by other positions. Upon his termination, Rubbermaid gave Miller severance pay and other consideration, and Miller executed a waiver of "any and all claims" he may have had against Rubbermaid.

Despite waiving any and all claims against Rubbermaid, Miller filed a *qui tam* action under the False Claims Act, 31 U.S.C. § 3729, *et seq.*, against Rubbermaid on January 5, 1993. Although Miller's employment with Rubbermaid had been terminated approximately ten months before he filed that lawsuit, Miller did not assert retaliatory termination under 31 U.S.C. § 3730(h) as a claim in his *qui tam* action. The case was taken over by the Department of Justice and ultimately settled. As a result of the settlement, Miller entered into a Stipulated Dismissal With Prejudice and received $185,000.00.

Although Miller believes that he was fired because Rubbermaid assumed that he was going to file a *qui tam* action against Rubbermaid, Miller never mentioned to his supervisor or any other member of management the

phrase "*qui tam* action." Miller testified during his deposition that prior to his termination on March 20 (between March 6 and March 19), he had not even thought about initiating an action against the company regarding the alleged unlawful pricing practices. Miller testified that he did not start to consider a *qui tam* action against Rubbermaid until approximately six (6) to ten (10) weeks after his termination.

Nevertheless, and despite his waiver of any and all claims against Rubbermaid, Miller filed the instant retaliation action on February 27, 1996. The district court granted summary judgment to Rubbermaid, holding that Miller's retaliation claim could have been brought with his original *qui tam* action and was thus barred by claim preclusion. As a result of this holding, the district court did not reach the issue of whether Miller's claims were barred by settlement and release, or whether the evidence, viewed in a light most favorable to Miller, could support a jury verdict that Rubbermaid terminated his employment because he engaged in protected activity. The Eleventh Circuit Court of Appeals affirmed the district court on the basis of claim preclusion.

REASONS FOR DENYING THE WRIT

There are no compelling reasons for this Court to review the decision of the Court of Appeals on writ of certiorari, and multiple reasons for denying the petition for review:

- Miller cites no departure in this case from the accepted and usual course of judicial proceeding so as to call for an exercise of this Court's supervisory power;

- Miller cites no decision of a federal question by a United States court of appeals that conflicts with any decision of any other United States court of appeals;
- Miller cites no important question of federal law that has not been decided and should be settled by this Court, or that has been decided in a way that conflicts with relevant decisions of this Court;
- The Court of Appeals applied the correct legal standard to the facts of the case, and Miller's objection to the Court of Appeals's decision is based on his opinion that the Court misapplied a correctly stated rule of law.

ARGUMENT

Notwithstanding Miller's arguments to the contrary, this case does not involve any unique or novel question of law. Rather, it involves the straightforward application of the well-settled principles of claim preclusion to undisputed facts.

As the Court of Appeals correctly held, Miller's retaliation claim is barred under the doctrine of claim preclusion (formerly known as "res judicata"). In the Eleventh Circuit, claim preclusion bars a subsequent lawsuit when four elements are present: (1) a final judgment on the merits; (2) a decision rendered by a court of competent jurisdiction; (3) identical parties or privies in both suits; and (4) the same cause of action in both suits. *Jang v. United Techologies Corp.*, 206 F.3d 1147, 1149 (11th Cir. 2000); *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

In this case, it is not disputed that the first three elements of claim preclusion are met. Miller previously entered into a stipulation of dismissal with prejudice of the False Claims Act lawsuit against Defendants. In addition, the court had proper jurisdiction over the prior False Claims Act claim, and the parties in both lawsuits are virtually the same. Thus, the critical component in determining whether Miller's instant retaliatory discharge claim is barred by claim preclusion (and the only one with which Miller takes issue in his petition) is whether "the same cause of action" is involved in both cases.

The Eleventh Circuit followed the "transactional approach" to determine whether Miller's prior False Claims Act lawsuit and the instant retaliatory discharge lawsuit brought under the False Claims Act constitute the same "cause of action." *Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235, 1239 (11th Cir. 1999) (*citing Citibank*, 904 F.2d at 1503). That is, "if a case arises out of the same nucleus of operative fact, or is based upon the same factual predicate, as a former action, . . . the two cases are really the same 'claim' or 'cause of action' for purposes of res judicata." *Citibank*, 904 F.2d at 1503; *see also Israel Discount Bank LTD v. Entin*, 951 F.2d 311, 315 (11th Cir. 1992); *Clark v. Haas Group, Inc.*, 953 F.2d 1235, 1238 (10th Cir. 1992), *cert. denied*, 506 U.S. 832 (1992). The underlying purpose behind this policy is to prevent a party "from relitigating issues that were or could have been raised" in a prior lawsuit. *Clark*, 953 F.2d at 1238.

As the Court of Appeals correctly concluded, Miller's instant claim under § 3730(h) is based on "the same cause of action" as the earlier False Claims Act lawsuit because the instant case arises out of the same nucleus

of operative facts, or is based upon the same factual predicate, as the earlier False Claims Act action, such that the two cases constitute the same "cause of action" for purposes of claim preclusion. *See Citibank*, 904 F.2d at 1503. Both claims rest on the statutory provisions of the False Claims Act; both claims relate to Miller's former employment with Rubbermaid; both claims involve the same parties and witnesses; and both claims would have made a convenient trial unit. *United States ex rel. Paul v. Parsons, Brinkerhoff, Quade & Douglas, Inc.*, 860 F. Supp. 370, 374-75 (S.D. Tex. 1994), *aff'd without op.*, 53 F.3d 1282 (5th Cir. 1995), *cert. denied*, 516 U.S. 1094 (1996) (pricing violations claim under False Claims Act which could have been, but was not, brought as part of earlier retaliatory discharge claim under False Claims Act was barred by claim preclusion); *cf. Grand v. Northrop Corp.*, 811 F. Supp. 333, 336 (S.D. Ohio 1992) ("we note that a relator's *qui tam* claim is often interrelated to his claim for retaliation"). Moreover, as the Court of Appeals held, Miller's cause of action for retaliatory discharge, of which he was clearly was aware, had already accrued at the time he filed his earlier False Claims Act claim, and he could have and should have asserted the retaliation claim as part of his earlier claim so that all his claims arising out of the same facts and involving the same parties could have been litigated in one forum instead of in this piecemeal fashion. Finally, the Court of Appeals noted that Miller received a bounty of $185,000 as a result of his *qui tam* claim and correctly concluded that "to allow him to proceed with [the instant case] would permit future *qui tam* plaintiffs strategically to sever their claims in the hope of obtaining a second bite at the apple, should their first action prove unsuccessful. **This is textbook**

[claim preclusion] ." *Ragsdale*, 193 F.3d at 1240 (11th Cir. 1999) (emphasis added). In other words, it is clear that the Court of Appeals applied the well-settled principles of claim preclusion to the undisputed facts of this case and correctly concluded that Miller's subsequent retaliation action was barred.

Miller bases his petition for review on nothing more than his unsupported opinion that the case at bar was wrongly decided by the Court of Appeals. Indeed, Miller simply disagrees with the Court of Appeals's application of the well-settled principles of claim preclusion and instead argues that his retaliation claim should not be barred because the government, as intervenor, would not have vigorously prosecuted his retaliation claim had it been brought as part of his original *qui tam* claim. However, it is well-settled that this Court generally will not grant a petition when the asserted error consists of what the petitioner perceives as erroneous factual findings or the misapplication of a properly stated rule of law. SUP. CT. R. 10.

Additionally, although this clearly is not a reason for granting Miller's petition, it is worth noting that Miller's rationale lacks merit. Miller cites to no evidence to support his opinion that the government does not or would not vigorously prosecute a relator's retaliation claim. The only support Miller offers is his unsubstantiated surmise that this would happen. Miller also overlooks the fact that if the government simply abandoned relators' claims upon taking over *qui tam* actions, there would be less incentive for relators to bring *qui tam* actions in the first place. Clearly the government recognizes that the relator is the *sine qua non* of a *qui tam* action and would not abandon relators' individual

claims to further its own ends. To suggest otherwise is to stretch the laws of reason.

CONCLUSION

Miller's opinion that the Court of Appeals reached the wrong decision in his case is not a reason for granting the petition. Rather, as set forth above, there are several compelling reasons why the petition should be denied. Accordingly, Rubbermaid respectfully requests the Court to deny the petition.

Respectfully submitted,

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